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## State Private Property Rights Initiatives As a Response To "Environmental Takings"

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# State Private Property Rights Initiatives As a Response to "Environmental Takings"

Nancie G. Marzulla\*

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## I. INTRODUCTION

In increasing numbers, federal, state, and local governments are regulating property in the name of environmental protection.<sup>1</sup> Over the last

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1. Although other government regulations can violate the U.S. Constitution's Fifth Amendment—see, e.g., *Hodel v. Irving*, 481 U.S. 704 (1987) (striking down a federal law that provided for escheat of tribal property interests); *Richardson v. City and County of Honolulu*, 802 F.Supp. 326 (D.Haw. 1992) (city ordinance imposing ceilings on lease rents); *Seawall Assoc. v. City of New York*, 542 N.E.2d 1050 (N.Y. 1989) (overturning a city city ordinance prohibiting the demolition, alteration, or conversion of single-room occupancy rental properties); and *United Artists Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612 (Pa. 1993) (finding no taking in a city ordinance designating property as historic)—this Article is limited to a discussion of environmental regulations.

two decades the growth of this country's environmental regulatory regime has been nothing short of astonishing. It accounts for many of the regulations covering almost every aspect of our lives, which grow by 200 pages each day in the Federal Register. The number of laws we are obliged to obey has grown by a staggering 3,000 percent since just the turn of the century.<sup>2</sup>

The result is that the United States has the most complex and intrusive environmental protection laws in the world. They also are the most expensive. On budget, environmental regulation annually costs Americans between \$120 billion and \$300 billion. An additional \$1 billion is paid to the federal government in cleanup costs by American companies every year.<sup>3</sup> Another \$62.9 million was paid in criminal penalties as a result of the more than 200 federal criminal indictments for alleged environmental crimes.<sup>4</sup>

Off budget, countless individuals across the nation are being singled out to bear the costs of implementing environmental policies that government is unwilling to pay by itself. Through its ability to regulate, the government "takes" whatever use and benefits to property it wishes. Since the title to the property stays with the owner, the government finds that only rarely is it forced to pay for it. For example, regulations imposed to protect wetlands proclaim that more than 100 million acres of land in this country must remain in pristine condition, as required by a definition of "wetland" that has no basis in science (and when Congress itself has never even agreed upon a definition for a wetland, scientific or otherwise).<sup>5</sup> Seventy-five percent of all wetland in this country is privately "owned," but the unlucky owners must leave their land untouched due to such regulations, and rarely will receive any payment from the government for so doing. Likewise, endangered species habitat locks up additional hundreds of thousands of acres of privately-owned land. While the protected species often is something as ecologically insignificant as the few salamanders living in pools that feed off the Edwards Aquifer in San Antonio, Texas, their protection threatens the future of a thriving city's water supply.<sup>6</sup>

Environmental protection has been pitted against the rights of the individual to use and benefit from his own land, and against the ability of communities to maintain a tax base. This has left a bitter taste in the mouths of millions of people all across America who are beginning to fight back.

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2. Nancy Hollander, *The More Corrupt the Republic, The More the Laws*, *Champion*, November 1992, at 3.

3. *House Committees, Legal Expert Predict Probe of DOJ Enforcement Will Continue*, *Daily Env't Rep. (BNA)*, at AA-14 (Oct. 8, 1992).

4. Memorandum of Neil Cartusciello, Chief of Environmental Crimes Section, U.S. Dep't of Justice (Mar. 31, 1992).

5. See *United States v. Mills*, 817 F. Supp. 1546, 1553-54 (N.D. Fla. 1993).

6. See, e.g., Linda Kanamine, *Texans Wage War Over Water Species*, *USA TODAY*, March 4, 1993, at A10; Tom Kenworth, *One-Inch Fish Threatens to Parch San Antonio*, *WASH. POST* February 14, 1993, at A3.

These people are organizing and learning about their rights, trying to find ways to seek relief from the "environmental overkill"<sup>7</sup> that has become so rampant in this country. They also are taking their cause to the courts—and emerging victorious in large numbers.

Most notably, however, they are turning their frustration into political capital that has translated into the introduction of more than a hundred property rights bills in forty-four states.<sup>8</sup> Property owners have chosen to fight back in the forums they know best—state and local governments—which in turn are ahead of the federal government in turning the tide in favor of private property rights. Those who once felt powerless to protect their rights are aggressively seeking relief, passing laws that require prior assessment of the potential "takings" implications of new rules before they go into effect. Some states have gone even further, introducing bills that ease the litigation burden facing the state and the property owner by clarifying when compensable takings have occurred.

This Article opens by describing the enormous growth of the environmental regulatory state.<sup>9</sup> It then discusses why neither the judiciary<sup>10</sup> nor the federal executive or legislature<sup>11</sup> has played a satisfactory role in protecting private property rights against uncompensated "environmental takings." This shows why it is no surprise that the people are turning, with increasing success, to state legislatures for this protection.<sup>12</sup> The Article concludes with a reminder that private property rights are a fundamental human right.<sup>13</sup>

## II. THE GROWTH OF THE ENVIRONMENTAL REGULATORY STATE

Environmental regulations touch virtually every individual in this country on a daily basis. Environmental laws regulate the air we breathe, the water we drink, the food we eat, the clothes we wear, and the homes in which we live. Likewise, nearly every sector of the economy is touched by environmental laws, whose reach is becoming increasingly global. Today, environmental regulations extend from the depths of the oceans to the heights of the stratosphere, from the rain forests of South America to the windswept heights

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7. See DIXIE LEE RAY & LOU GUZZO, ENVIRONMENTAL OVERKILL: WHATEVER HAPPENED TO COMMON SENSE? (1993). The book contrasts the enormous, hidden costs of environmental regulation with the often illusory public benefits of such regulations.

8. See, e.g., DEL. CODE ANN. tit. 29, § 605 (Supp. 1994); IND. CODE § 4-22-2-32 (Supp. 1994); UTAH CODE ANN. § 63-90-1 to 63-90-4 (Supp. 1994); WASH. REV. CODE § 36.70A.040 (Supp. 1994).

9. *Infra* part II.

10. *Infra* part III.

11. *Infra* part IV.

12. *Infra* part V.

13. *Infra* part VI.

of the mountains of Mongolia and back again, to include a blind salamander living in a single cave in Arkansas and enormous whales under the sea. It is no wonder the individual often feels incapable of protecting his rights against this massive regulatory steamroller.

### *A. What the Federal Government Has in Store for Us*

Most of the major environmental statutes have long since passed their expiration dates, and are in need of reauthorization. Members of both houses introduced a broad array of bills in the 103rd Congress to reauthorize and amend the Clean Water Act,<sup>14</sup> the Endangered Species Act,<sup>15</sup> the Resource and Conservation Recovery Act<sup>16</sup> (RCRA), and the Comprehensive Environmental Response, Compensation and Liability Act<sup>17</sup> (CERCLA or "Superfund"). None passed, but all likely will be back in the 104th Congress.

As written, the bills generally would have increased penalties for violations, tightened regulatory requirements, and expanded regulations over large groups of individuals and activities not currently subject to federal environmental jurisdiction. One bill, for example, would have defined an individual convicted of an environmental offense as a "bad actor," disqualifying the convicted person or company from participation in government contracting, loan, and grant programs.<sup>18</sup> Another bill would have authorized federal judges to compel corporations to adopt comprehensive environmental compliance programs designed by an outside consultant appointed by the court, and would have punished infractions of the compliance plan as probation violations.<sup>19</sup>

The Clinton administration has given high priority to environmental issues. It is seeking to abolish the Council on Environmental Quality (an independent office established by Congress), replacing it with direct White House control over environmental issues.<sup>20</sup> The administration, along with some in Congress, also strongly supports elevation of the Environmental Protection Agency to cabinet status as the United States Department of Environmental Protection.<sup>21</sup> Vice President Gore has taken direct charge of

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14. 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993).

15. 16 U.S.C. §§ 1531-1544 (1988 & Supp. V 1993).

16. 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993).

17. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V. 1993).

18. H.R. 908, 103d Cong., 1st Sess. (1993) (the "Bad Actors" bill).

19. H.R. 3461, 103d Cong., 1st Sess. (1993).

20. Tom Kenworthy, *Clinton Plan on CEQ Sparks Tiff with Environmentalists*, WASH. POST, March 25, 1993, at A22.

21. Gary Lee, *House Leaders Defer Vote on Cabinet Rank for EPA; GOP Opposition to Clinton Measure Growing*, WASH. POST, Nov. 20, 1993, at A4; Tom Kenworthy, *Synar May Push Stop on EPA Elevator*, WASH. POST, April 7, 1993, at A25.

the newly created White House Office of the Environment, and has demonstrated a personal interest in virtually every environmental and natural resource policy issue. At the April 2, 1993, Timber Summit in Portland, Oregon, held to discuss environmental issues in the Northwest forests, President Clinton and Vice President Gore were joined by no fewer than seven cabinet members, each of whom offered his or her own suggestions for dealing with issues such as spotted owls, timber, and jobs.<sup>22</sup>

Vice President Gore also has personally proposed a new method of reviewing government regulations—with a special emphasis on environmental regulations—to replace Office of Management and Budget review under Executive Order No. 12,291.<sup>23</sup> Although the outlines of the Gore proposal are not yet clear, his new process undoubtedly will be even more favorable to expansive government regulation. Indeed, the Clinton administration gives strong evidence of subscribing to Vice President Gore's exhortation that the world adopt a new "central organizing principle":

embarking on an all-out effort to use every policy and program, every law and institution, every treaty and alliance, every tactic and strategy, every plan and course of action—to use, in short, every means to halt the destruction of the environment and to preserve and nurture our ecological system.<sup>24</sup>

### *B. Federal Environmental Statutes and Their Influence on State Law*

None of this is to say that environmental overkill by the federal government is anything new. Existing federal environmental statutes comprehensively regulate vast segments of our nation's economy—touching upon land, water, air, natural resources, timber, wildlife, and a whole host of other components of the biosphere. Although early federal environmental regulation can be traced to conservationists like John Muir, Gifford Pinchot,

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22. Ruth Marcus, *Clinton to Hold Talks in Oregon on Forests*, WASH. POST, March 11, 1993, at A13; Tom Kenworthy, *The Owl and the Lumberjack: Can Clinton Break the Logjam?*, WASH. POST, April 2, 1993, at A4; Tom Kenworthy & Ann Devroy, *Clinton Pledges "Balanced" Solution to Forest Policy Crisis in 2 Months*, WASH. POST, April 3, 1993, at A9.

23. Stephen Barr, *"Reinvention" Delivers Smaller U.S. Bureaucracy, But Will the Goal of Better Service Suffer?*, WASH. POST, Sept. 13, 1994, at A1; Stephen Barr, *Fast Track to Streamlined Procurement? Seeking Action by Year's End, Administration to Propose Legislative Package on Tuesday*, WASH. POST, Oct. 25, 1993, at A17; Stephen Barr, *White House Shifts Role in Rule-Making; Clinton Seeks to End Closed-Door Process*, WASH. POST, Oct. 1, 1993, at A1; Stephen Barr, *Reinventing Government Moves Forward, More or Less Smoothly*, WASH. POST, March 12, 1993, at A21.

24. AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* 274 (Houghton Mifflin Co. 1992).

and Theodore Roosevelt, the modern environmental regime, for all practical purposes, was born on the first Earth Day—April 22, 1970. Congress passed a string of environmental statutes in rapid succession, weaving a net of regulations that covers virtually every aspect of property use and ownership.

Not only do these regulations involve the federal government in limiting the exercise of private property rights, but they have required, encouraged, or served as a model for greater state and local regulation as well. The major federal statutes are set out below.<sup>25</sup>

The National Environmental Policy Act (NEPA)<sup>26</sup> requires the preparation of an environmental impact statement for any major federal action significantly affecting the quality of the human environment. Since “major federal action”<sup>27</sup> encompasses permits and authorizations of many kinds, from specific projects such as road construction or mineral and timber sales to generic programs like oil leasing or gas exploration on federal lands, NEPA, in fact, affects a broad array of private resource development. Opponents of this kind of development rely upon NEPA—often referred to as the “grandfather of all environmental statutes”—as a means of stopping the project on the grounds that an environmental impact statement was either not prepared or is inadequate.

The Clean Air Act,<sup>28</sup> originally passed in 1970, significantly amended in 1977,<sup>29</sup> and massively overhauled in 1990,<sup>30</sup> regulates emissions of pollutants into the atmosphere. It requires permits for “major sources” of pollution, especially particulates, volatile organic compounds, sulfur dioxides, nitrogen oxides, air toxins, and depleters of stratospheric ozone.<sup>31</sup> Regulations that implement the Clean Air Act of 1990 still are being written, so basic questions about operating permits and air quality requirements remain unanswered. Like the Clean Water Act, the Clean Air Act is implemented primarily through state legislation that must be submitted for federal review in the form of a State Implementation Plan.<sup>32</sup> The failure of a state to pass legislation to the satisfaction of the federal government may result in

25. A useful compendium of the various federal statutes discussed in text is *FEDERAL ENVIRONMENTAL LAWS* (West Publishing Co. ed., 1993).

26. 42 U.S.C. §§ 4321-4370d (1988).

27. *Id.* § 4332(c).

28. 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993).

29. 195-95, 91 Stat. 685; Pub. L. No. 95-190, 91 Stat. 1404; Pub. L. No. 97-375, 96 Stat. 1820 (codified as amended in scattered sections of 42 U.S.C.).

30. Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. §§ 7401-7671g (Supp. V 1993)).

31. 42 U.S.C. §§ 7661-7661f (Supp. V 1993).

32. *See, e.g.*, 42 U.S.C. § 7410 (1988 & Supp. V 1993) (requiring state implementation plans for ambient air quality standards); 42 U.S.C. § 7412f (Supp. V 1993) (requiring state implementation plans for hazardous air pollutants).

imposition of a Federal Implementation Plan,<sup>33</sup> as well as sanctions that include the cutoff of highway construction funds<sup>34</sup> and punitive cutbacks in allowable emissions.<sup>35</sup> The federal Clean Air Act is the most expensive of the federal environmental regulatory programs to date.

The Clean Water Act<sup>36</sup> regulates the discharge of pollutants into waters of the United States. Passed in 1972, the Clean Water Act has not yet been significantly amended, although amending legislation was proposed but not passed in the 103rd Congress. Like the Clean Air Act, the Clean Water Act is implemented through state permitting programs, here called the National Pollution Discharge Elimination System permit program.<sup>37</sup> Unlike the Clean Air Act, however, the Clean Water Act has no State Implementation Plans. Instead, the federal government prescribes water quality standards that the states must achieve. The Clean Water Act is also a principal vehicle for funding municipal wastewater treatment plants. Section 404 of the Clean Water Act<sup>38</sup> serves as authority for federal regulation of approximately 100 million acres of wetlands.

The Resource Conservation and Recovery Act (RCRA)<sup>39</sup> prescribes a "cradle-to-grave" program for the management of hazardous waste. Drums of hazardous waste must be labeled, manifested, and tracked to their ultimate place of disposal. Treatment, storage, and disposal facilities must obtain RCRA permits and comply with stringent regulations concerning their construction, allowable wastes, groundwater monitoring, closure plans, and financial responsibility. RCRA permitting programs are often delegated to states, which often impose additional requirements with regard to handling hazardous wastes.

The Comprehensive Environmental Response, Compensation, and Liability Act<sup>40</sup> differs from the Clean Air Act, Clean Water Act, and RCRA in that it is a liability scheme rather than a permitting program. CERCLA imposes liability upon the owner, operator, transporter, or arranger for the disposal of hazardous substances whenever those substances are released into the environment.<sup>41</sup> Comprehensively overhauled in 1986 by the Superfund Amendments and Reauthorization Act (SARA),<sup>42</sup> the statute imposes strict,

33. 42 U.S.C. § 7413(a)(2) (Supp. V 1993).

34. 42 U.S.C. § 7509(b) (Supp. V 1993).

35. 42 U.S.C. § 7413(a)(5) (Supp. V 1993).

36. 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993).

37. 33 U.S.C. § 1342 (1988 & Supp. V 1993).

38. 33 U.S.C. § 1344 (1988 & Supp. V 1993).

39. 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993).

40. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

41. 42 U.S.C. § 9607 (1988 & Supp. V 1993).

42. Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered sections of 42 U.S.C.).



joint, and several liability for cleanup costs. Those costs may be recovered by the federal government or innocent third parties. CERCLA also provides injunctive authority to the federal government to require private parties to clean up their sites,<sup>43</sup> and involves the federal government in the design and implementation of cleanup programs.<sup>44</sup> Most states also have their own cleanup programs and mini-superfunds.

The Oil Pollution Act of 1990<sup>45</sup> was passed as a result of the 11 million-gallon Exxon Valdez oil spill in Prince William Sound, Alaska. The Act imposes liability upon the owners and operators of vessels or facilities from which oil is released<sup>46</sup> and requires the preparation of extensive oil-spill contingency plans to guarantee readiness in the event of a serious oil spill.<sup>47</sup> In addition to national regulations, many states have adopted their own oil- and chemical-spill response programs to supplement the federal program.

The Surface Mining Control and Reclamation Act of 1977,<sup>48</sup> administered by the Surface Mining Office of the Interior Department, requires the reclamation of surface-mine lands to conditions approximating their original natural contours. Penalties assessed by the act are deposited in the Abandoned Mineland Reclamation Fund for reclamation of orphan sites. This regulation also has many state-enacted counterparts.

The Endangered Species Act of 1973<sup>49</sup> forbids the “taking” of any species of plant or animal listed by the U.S. Fish and Wildlife Service as endangered, including disturbance of the habitat of that species. The Clinton administration has suggested the act should be broadened to include protection of the ecosystem upon which the endangered species (as well as other species) depends.<sup>50</sup> Severe civil and criminal penalties may be imposed for violations of the statute.<sup>51</sup> Most states have species protection statutes of their own.

The Marine Protection Research and Sanctuaries Act of 1972<sup>52</sup> governs the disposal of sewage, sludge, and other waste into the ocean. Most coastal states have various kinds of shoreline and coastal protection laws.<sup>53</sup> The

43. 42 U.S.C. § 9606 (1988 & Supp. V 1993).

44. 42 U.S.C. §§ 9605-9606 (1988 & Supp. V 1993).

45. 33 U.S.C. §§ 2701-2761 (Supp. V 1993).

46. 33 U.S.C. § 2702(a) (Supp. V 1993).

47. 33 U.S.C. § 2732(a) (Supp. V 1993).

48. 30 U.S.C. §§ 1201-1328 (1988 & Supp. V 1993).

49. 16 U.S.C. §§ 1531-1544 (1988 & Supp. V 1993).

50. See, e.g., Gary Lee, *U.S., State Issue Plan to Paid Northern California's Environment*, WASH. POST, December 16, 1994, at A20; Tom Kenworthy, *Babbitt Clears Compromise to Protect California Bird*, WASH. POST, March 26, 1993, at A2.

51. 16 U.S.C. § 1540 (1988 & Supp. V 1993).

52. 33 U.S.C. §§ 1401-1445 (1988 & Supp. V 1993).

53. See, e.g., S.C. CODE ANN. §§ 48-39-10 to -390 (Law. Co-op. 1987 & Supp. 1993).

Coastal Zone Management Act of 1972<sup>55</sup> requires states to adopt plans for the protection of their coastlines and coastal waters.

The Federal Insecticide, Fungicide, and Rodenticide Act<sup>56</sup> requires testing, registration, and labeling of pesticides. The Toxic Substances Control Act<sup>57</sup> requires the registration and testing of new chemicals. The Public Health Safety Act, including the Safe Drinking Water Act<sup>58</sup> regulates small, private water-distribution systems, and provides standards for public water systems. This law is supplemented by state health laws requiring testing and safety standards for municipal water systems and drinking-water wells.

The Emergency Planning and Community Right-to-Know Act<sup>59</sup> deals with planning for environmental catastrophes.

As noted, the fifty states have adopted environmental protection schemes of greater or lesser complexity that mirror these federal statutes, and are adapted to the states' own ecological, economic, and social needs. Some of these programs are federally mandated, while others are purely "homegrown." The variety and peculiarities of state environmental regulation cannot be catalogued here; suffice it to say that, in many instances, it is the state regulatory scheme rather than the federal that most directly touches the people in this country on a day-to-day basis.

We have seen that a number of federal environmental statutes set minimums (or "floors") for state environmental protection on the rationale that states should not be allowed to create "pollution havens" where industry may flee to avoid environmental regulation. These federal statutes, however, provide states with substantial flexibility in determining how they will achieve compliance with federal requirements, and allow them to adopt more stringent regulations than those already federally mandated. Thus, while states are required to prepare State Implementation Plans to be submitted to the federal government for approval under the Clean Air Act, state air pollution control laws often reach far beyond federal requirements. States such as California, New York, and Colorado have highly specialized air pollution regulations to address their unique and very different climatic conditions, geographies, and population distributions. Likewise, programs for controlling water pollution, wetlands, nonmunicipal drinking-water supplies, underground injection, and other treatment or disposal programs for hazardous waste must also be conducted in accordance with federal regulations.

Mine-land bonding and reclamation, application of agricultural chemicals, and protection of groundwater, however, are effectively "state-led" programs

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55. 16 U.S.C. §§ 1451-1464 (1988).

56. 7 U.S.C. §§ 136 to 136y (1988 & Supp. V 1993).

57. 15 U.S.C. §§ 2601-2692 (1988 & Supp. V 1993).

58. 42 U.S.C. §§ 300f to 300j-26 (1988).

59. *Id.* §§ 11,001-11,050.

where the federal government defers to local authorities, judging them to be more appropriate regulators of such activities. State “mini-superfunds,” “SEPA” (versus “NEPA”) requirements, recycling laws, labeling rules, and “community right-to-know” requirements are further examples of state analogies to federal statutes that either embroider the federal regulatory program or extend to activities not previously regulated.

Public health and safety traditionally has been the domain of the states rather than the federal government. But recent years have seen significant federal encroachment upon this formerly exclusive preserve of the states. Zoning and land-use restrictions on private property also are essential functions of state and local government that have been the target of recent federal incursions (most notably wetlands regulation). States have recently expanded their land-use regulations to include historic preservation,<sup>60</sup> battlefield protection,<sup>61</sup> scenic designations,<sup>62</sup> setbacks along waterways and streams,<sup>63</sup> farmland protection,<sup>64</sup> establishment of “greenways,”<sup>65</sup> designation of parks and preserves,<sup>66</sup> and restrictions on natural resource development.<sup>67</sup> These regulations have been linked with outright prohibitions relating to environmental, cultural, aesthetic, historical, and other considerations.

Finally, licensing and permitting schemes, economic incentives, and taxation also are used by state and local governments as a means of encouraging or discouraging certain economic activities affecting the environment. Taken together with a comprehensive battery of federal, state, and local regulations that are directly applicable to activities affecting the environment and land use, these policies can effectively prohibit or even eliminate many otherwise feasible and productive activities.

### III. “ENVIRONMENTAL TAKINGS”: THE LIMITS OF JUDICIAL PROTECTION

Environmental regulation is the newest and most extensive governmental regulatory program yet conceived. Economic activities that were formerly considered acceptable—even laudable—have been labeled undesirable over the past few decades. In many instances they have even become unlawful. Examples of new offenses include air conditioning, draining swamps,

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60. *See, e.g.*, ALA. CODE §§ 11-68-1 to -15, (Michie 1994); ARIZ. REV. STAT. ANN. § 42-164 (Supp. 1994).

61. *See, e.g.*, TENN. CODE ANN. 4-11-501 to -506 (Supp. 1994).

62. *See, e.g.*, ALASKA STAT. § 41.21.131 (1993).

63. *See, e.g.*, CAL. WATER CODE § 55-5 (West Supp. 1995).

64. *See, e.g.*, KAN. STAT. ANN. §§ 2-3201 to -3204 (1991).

65. *See, e.g.*, FLA. STAT. ANN. §§ 253.7810 to -7828 (West Supp. 1995).

66. *See, e.g.*, ALA. CODE § 9-2-3 (Michie 1987).

67. *See, e.g.*, FLA. STAT. ANN. § 369.305 (West Supp. 1995).

reformulated gasolines, the installation of asbestos as a fire retardant, and improving farm productivity through the use of chemical fertilizers and pesticides.

Much of this regulation is predicated on incomplete or developing scientific knowledge for which consensus does not yet exist. It also is predicated on philosophical and aesthetic tenets that are not necessarily universal and are, in many instances, conflicting and self-contradictory. Not surprisingly, some people have raised the legitimate question: How far can government go in the name of environmental protection?

As discussed below, the courts have used the Takings Clause of the Fifth Amendment to place some constitutional limits on what government can do. Those limits, however, still leave property owners vulnerable to uncompensated "environmental takings."

#### *A. The Takings Clause of the Fifth Amendment*

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."<sup>68</sup> It recognizes the authority of the government to take private property for public use such as the construction of highways, hospitals, and military facilities. Such takings are conditioned on the requirement that "just compensation" be paid to the owner of the property. The taking of private property by the government for public use without just compensation is thus unconstitutional and void.<sup>69</sup>

The government traditionally acquires property from private parties through the condemnation process. This legal process provides for an explicit exchange of money for title to the land, adhering scrupulously to the requirements of the Takings Clause. Americans are accustomed to a system of justice where private property that is taken by the government is paid for no matter how lofty the goals of the government project or how wealthy the owner of the property. By analogy, when the government assumes physical possession of property without demanding the passage of legal title, the owner also is entitled to just compensation.<sup>70</sup> The rule applies whether the entire property or a mere possessory interest is taken, and whether the taking is a temporary or permanent one.

Thus, in *Kaiser Aetna v. United States*<sup>71</sup> the owner of a private waterway was entitled to recover the value of a navigational servitude asserted on behalf

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68. U.S. CONST., amend. V.

69. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

70. *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (finding that government seizure of coal mine during wartime constitutes a taking).

71. 444 U.S. 164 (1979).

of the public by the United States. In *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>72</sup> Justice Thurgood Marshall described the constitutionally protected liberty embodied in the Takings Clause, writing:

Property rights in a physical thing have been described as the rights “to possess, use and dispose of it.” To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights. Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.<sup>73</sup>

Nor is physical invasion in the name of the environment exempt from the just-compensation requirement of the Takings Clause. In *Hendler v. United States*<sup>74</sup> the United States Court of Appeals for the Federal Circuit held that a landowner is entitled to recover just compensation for government’s occupancy of a portion of his land by groundwater monitoring wells drilled in connection with the cleanup of a Superfund site:

The notion of exclusive ownership as a property right is fundamental to our theory of social organization. In addition to its central role in protecting the individual’s right to be let alone, the importance of exclusive ownership—the ability to exclude freeriders—is now understood as essential to economic development, and to the avoidance of the wasting of resources found under common property systems.

The intruder who enters clothed in the robes of authority in broad daylight commits no less an invasion of these rights than if he sneaks in the night wearing a burglar’s mask. In some ways, entry by the authorities is more to be feared, since the citizen’s right to defend against the

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72. 458 U.S. 419 (1982).

73. *Id.* at 435-36 (citations omitted).

74. 952 F.2d 1364 (Fed. Cir. 1991).

intrusion may seem less clear. Courts should leave no doubt as to whose side the law stands upon.<sup>74</sup>

Finally, the Fourteenth Amendment to the Constitution, ratified in 1868, establishes that no state shall "deprive any person of life, liberty, or property, without due process of law."<sup>75</sup> In 1897 the Supreme Court held that this extended the Fifth Amendment's protections against takings to the states as well as the federal government.<sup>76</sup>

### *B. Government Regulation and "Environmental Takings"*

The Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>77</sup> The Clause has proved to be an especially important restraint upon the government's exercise of regulatory authority, even though that exercise almost always is predicated upon principles of the public good and general welfare. As Justice Oliver Wendell Holmes, Jr., put it, "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."<sup>78</sup>

The "regulatory taking," while posing special analytic problems, does not differ in constitutional terms from takings by condemnation or physical invasion.

The Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation." This constitutional guarantee is more than just a limitation against the physical seizure or invasion of property by the government in the name of the public good. The Fifth Amendment also provides just compensation against governmental regulations which effectively accomplish the same destructive end.<sup>79</sup>

Accordingly, courts have held that the just compensation requirement of the Fifth Amendment entitles an owner to compensation where his property has been taken under a variety of environmental regimes: wetlands,<sup>80</sup> Super-

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74. *Id.* at 1375 (citations omitted).

75. U.S. CONST., amend. XIV.

76. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241 (1897).

77. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

78. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

79. *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 385 (1988).

80. *Id.* See also *Florida Rock Indus. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987). For important further proceedings in these two cases, see *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Florida Rock Indus.*

fund,<sup>82</sup> the Endangered Species Act,<sup>83</sup> the Federal Insecticide, Fungicide, and Rodenticide Act,<sup>84</sup> flood plain protection,<sup>85</sup> and coastal zone conservation.<sup>86</sup>

Mining and mineral extraction, being the subject of pervasive environmental regulation, likewise has served as a significant battleground between the government and the owners of private property. In *Whitney Benefits, Inc. v. United States*<sup>87</sup> the owner of a Wyoming coal deposit was awarded more than \$60 million because the Surface Mining Control and Reclamation Act forbade extraction of the coal. The seminal case of *Pennsylvania Coal Co. v. Mahon*<sup>88</sup> invalidated an antisubsidence statute, and in *United Nuclear Corp. v. United States*<sup>89</sup> the refusal of the Secretary of the Interior to approve a plan of operations of a uranium mine on Indian land was claimed to entitle the owner of the mineral lease to just compensation.

Several other recent regulatory takings cases in the federal courts also bear mention. Since 1978 the Supreme Court has identified at least three areas that constitute per se violations of the Fifth Amendment. In *Hodel v. Irving*<sup>90</sup> the Court held that the destruction of the right to devise private property violates the Fifth Amendment. In *Nollan v. California Coastal Commission*<sup>91</sup> the Court determined that a property regulation which does not substantially advance its avowed governmental purpose also constitutes a taking. In *Lucas v. South Carolina Coastal Council*<sup>92</sup> the Court held that destruction of all productive and beneficial uses of private property by prohibiting construction within a coastal zone violated the Fifth Amendment. The most recent pronouncement by the Supreme Court on the issue of property rights, *Dolan v. City of Tigard*,<sup>93</sup> suggests that such rights will no longer be accorded less protection than other civil rights: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First

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*v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3146 (U.S. Sept. 19, 1994) (No. 94-511).

82. *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991).

83. *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989).

84. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

85. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

86. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

87. 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991).

88. 260 U.S. 393 (1922).

89. 912 F.2d 1432 (Fed. Cir. 1990), (settled on remand).

90. 481 U.S. 704 (1987).

91. 483 U.S. 825 (1987).

92. 112 S. Ct. 2886 (1992).

93. 114 S. Ct. 2309 (1994).

Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.”<sup>94</sup> In *Nixon v. United States*<sup>95</sup> the D.C. Circuit spoke extensively of property rights as a complex network of reasonable expectations, social and historical custom, and the government’s regulatory authority.

State courts also are beginning to scrutinize environmental takings. A recent example involved the federal criminal law and state regulatory codes that make it a crime to develop private property if a pair of bald eagles are building a nest, even if the eagles later abandon the nest.<sup>96</sup> Relief from these pervasive restrictions came in *Flotilla, Inc. v. Florida*,<sup>97</sup> where the state circuit court for Manatee County, Florida, found that these statutes effected a taking for which the landowner was entitled just compensation: “The taking in this case is not a regulatory taking. The best description is perhaps an ‘environmental taking’. . . . [T]he State effectively created a habitat for the eagles, and empowered the eagles to decide which land would be taken.”<sup>98</sup>

Equally important cases for property rights are those involving neither federal nor state environmental takings, but local zoning and historic preservation statutes. In *United Artists Theater Circuit, Inc. v. City of Philadelphia*<sup>99</sup> a dispute arose when the Philadelphia Historical Commission designated the Boyd Theater as an historic site. As a result, the building’s owners were required to maintain the facility to commission standards at their own expense or face criminal penalties.<sup>100</sup> United Artists petitioned the Pennsylvania Supreme Court for relief. In 1991, the court ruled that Philadelphia’s historical preservation system was “unfair, unjust, and amount[ed] to an unconstitutional taking without just compensation . . . .”<sup>101</sup> As a result of strenuous protests from the state attorney general, state representatives, the National Historic Trust, and others, the court agreed to rehear the case. On November 9, 1993, the court held no taking had occurred, although it found for the owners on different grounds.<sup>102</sup> This

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94. *Id.* at 2320.

95. 978 F.2d 1269 (D.C. Cir. 1992).

96. FLA. STAT. § 372.0725 (1989).

97. 636 So. 2d 761 (Fla. Dist. Ct. App.), *rev. denied*, 645 So. 2d 452 (Fla. 1994).

98. *Id.* at 764.

99. 595 A.2d 6 (Pa. 1991), *rev’d*, 635 A.2d 612 (Pa. 1993).

100. *Id.* at 11.

101. *Id.* at 13-14.

102. 635 A.2d 612 (Pa. 1993). On reargument, the court reversed its previous ruling and held that “the designation of a building as historic without the consent of the owner is not a ‘taking’ that requires just compensation.” *Id.* at 614. The court nonetheless reached the same result as before by holding that the Historical Commission exceeded its legal authority in designating the interior of the building as historic and vacating the entire historic designation. *Id.*



case is significant because Philadelphia's historic preservation system is typical of many across the country.

Despite these recent rulings, the application of the Takings Clause to claims of regulatory taking remains an uncertain enterprise the outcome of which is heavily dependent upon the presiding judge and the facts of the particular case.<sup>103</sup> As Justice Brennan summed it up in an oft-quoted passage:

While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."<sup>104</sup>

Moreover, the ability of a property owner to prevail in a regulatory takings case remains the exception rather than the rule. Such litigation is a long and arduous process that only the most well-financed and dedicated property owner is able to endure.

In sum, the scales of justice are unfairly tipped in favor of the government when citizens are faced with the threat of losing their property because of regulatory burdens. Not only are the laws drafted to ease the litigation burden placed on the government, but the cost of takings litigation can range from \$50,000 to \$500,000 or more, which is too great a burden for the average citizen to bear. The government, on the other hand, does not face a similar shortage of resources in comparison to the individual property owner, and often can pursue the taking without constraint. Adding to the hardship, procedural hurdles can bar litigation on the merits of takings claims for anywhere from five to ten years. Thus, when faced with a government takings claim, many property owners choose not to pursue their rights under the Fifth Amendment.

Since the protection afforded property rights by the courts has not been satisfactory, property owners have turned to the federal and state legislative branches for help.

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103. See generally Roger J. Marzulla & Nancie G. Marzulla, *Regulatory Takings in the Claims Court: Adjusting the Burdens That in Fairness and Equity Ought to be Borne by Society as a Whole*, 40 CATH. U. L. REV. 549 (1991).

104. *Pennsylvania Central Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978).

#### IV. FEDERAL EXECUTIVE AND LEGISLATIVE ATTEMPTS TO PROTECT PROPERTY RIGHTS

##### A. *Executive Order No. 12,360*

It being evident that the courts were failing to protect private property rights adequately, the White House decided to step into the fray in 1988. President Reagan issued Executive Order No. 12,630, "Governmental Actions and Interference With Constitutionally-Protected Property Rights."<sup>105</sup> E.O. 12,630 recognizes that the government can, short of the formal exercise of its eminent domain authority, acquire private property through regulation or "inverse condemnation." Modeled after requirements for "Environmental Impact Analysis" under the National Environmental Policy Act of 1970, E.O. 12,630 requires "Takings Impact Analysis" of most government regulations to prevent unnecessary takings and to budget for compensation for those actions necessarily involving takings.<sup>106</sup> The order provides for an accounting of the takings implications of government regulations, but does not necessarily hinder the enforcement of any environmental or other governmental program.

The purpose of the executive order is "to assist Federal departments and agencies in . . . proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment" and "to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful government actions."<sup>107</sup> The Attorney General, in consultation with executive departments and agencies, is responsible for promulgating "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings."<sup>108</sup> The touchstone for formulating these guidelines is current Supreme Court decisions. Executive Order No. 12,630 does not enlarge or fix the scope or definition of regulatory takings. The Fifth Amendment itself still sets the floor upon which government may exercise its power in ways that adversely affect private property rights. E.O. 12,630 requires decisionmakers to ascertain whether a proposed action will activate the Constitution's guarantee that private property not be taken for public use without just compensation. The head of each executive department or agency must designate an official who is responsible for ensuring compliance with the

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105. 53 Fed. Reg. 8859 (1988).

106. See generally Roger J. Marzulla, *The New "Takings" Executive Order and Environmental Regulation—Collision or Cooperation?*, 18 Envtl. L. Rep. 10,254, 10,258 (July 1988). Mr. Marzulla, the chief architect of the executive order, served as Assistant Attorney General for the then-Land and Natural Resources Division of the United States Department of Justice in the Reagan administration.

107. Exec. Order No. 12,630, § 1(c), 53 Fed. Reg. 8859 (1988).

108. *Id.*

order, and agencies must report identified takings implications and actual takings claims to the Office of Management and Budget for planning and budgetary purposes.

Despite the clear wording of E.O. 12,630, *Congress Daily* reports that it “has gone mostly unused,”<sup>109</sup> especially by the Clinton administration. Increasingly, property owners are coming to realize that if their Fifth Amendment rights are to have real effect, still more must be done. That “more” means legislation.

### *B. Federal “Takings” Legislation*

Federal takings legislation, unfortunately, has met with hostile and effective opposition. But the proliferation of these bills in recent years, and the drama surrounding them, makes their progress worth recounting.

With the encouragement of the growing property rights movement, some members of Congress have attempted to codify the procedural property rights protections of E.O. 12,630 into federal statute. In 1990, Senator Steve Symms of Idaho introduced the first “private property” provision (modeled after E.O. 12,630) into an agriculture bill, but it narrowly failed by a vote of 52 to 43.<sup>110</sup> The following year, Symms introduced a separate “takings bill,” once again based on E.O. 12,630.<sup>111</sup> The bill required all federal agencies to conduct a takings

review of regulations before their promulgation. Under it, no regulation would become effective until the Attorney General certified that the issuing agency was complying with E.O. 12,630. This bill was also defeated.

Two years later—the day after Bill Clinton was sworn in as President of the United States—then-Senate Minority Leader Robert Dole of Kansas introduced his own version of Symms’ bill, the “Private Property Rights Act of 1993.”<sup>112</sup> He attempted to attach his bill as an amendment to Senator John Glenn’s bill to elevate the Environmental Protection Agency to cabinet status. Like the Symms takings bill, Dole’s amendment would prohibit any federal regulation from becoming effective until the Attorney General certified that the regulation complied with the terms of E.O. 12,630.

The Clinton administration waged a vigorous fight to kill the Dole amendment. Vice President Gore wrote,

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109. *EPA Measure Faces Hit on “Takings,”* NAT’L J.’S CONGRESS DAILY/A.M., Apr. 26, 1993, at 1.

110. S. 2830, 101st Cong., 2d Sess. (1990).

111. S. 50, 102d Cong., 1st Sess. (1991).

112. S. 177, 103d Cong., 1st Sess. (1993). Recently, another version of Dole’s property rights bill, cosponsored with Senator Howell Heflin of Alabama, was successfully added to the Senate version reauthorization of the Safe Drinking Water Act. S. 2019, 103d Cong., 2d Sess. (1994). This reauthorization has not passed, however.

I feel strongly, as you know, that this amendment should not be adopted, precisely because, among other things, it would greatly hamper the Administration's ability to fashion its own approach to regulatory review and instead, force us to adhere chapter and verse to a key element of the last administration's regulatory review program.<sup>113</sup>

He concluded, "We are considering every aspect of regulatory review, including how to treat the outstanding executive order on 'takings.' We strongly urge that any amendment to codify that order or otherwise to preempt the administration's review be rejected."<sup>114</sup> In similar fashion, Attorney General Janet Reno wrote Senator Glenn, "We believe . . . that freezing this Executive Order into law would be unwise. Codifying the Order as it stood in 1991 would prevent this and any future administrations from revising the Order. . . . [T]his legislation represents an unnecessary incursion upon the executive authority of the President . . . ."<sup>115</sup> Neither the Dole amendment or the Glenn bill passed.

Similar legislation to protect private property was introduced in the House of Representatives. Representative Gerald Solomon of New York introduced the House companion to Senator Dole's bill.<sup>116</sup> Meanwhile, Representative Gary Condit of California introduced the "Private Property Protection Act of 1993"<sup>117</sup> to require that federal agencies establish procedures for assessing whether federal regulations might result in takings of private property, and to require the Secretary of Agriculture to report to Congress on the effect this act would have on agriculture.

Other legislation in the House would have gone beyond the procedural requirements of E.O. 12,630. Representative Robert F. Smith of Oregon introduced the "Just Compensation Act of 1993"<sup>118</sup> to require the head of any federal agency who takes an action under the Endangered Species Act, the Surface Mining Control and Reclamation Act of 1977, specified portions of the National Trails Systems Act, or the Clean Water Act relating to wetlands to compensate the owner of private property for any diminution in value caused by the action. Representative Lamar Smith of Texas introduced legislation in 1994 to require federal agencies to notify property owners of regulations restricting use of their property.<sup>119</sup> The landowner is given ninety days to

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113. *Senate to Take Up Cabinet Bill Today, Debate on Wetlands, Rights*, NAT. ENV. DAILY (BNA) May 4, 1993.

114. Nancie G. Marzulla, *Dole Property Rights Amendment Fails*, LAND RIGHTS LETTER, June 1993, at 2.

115. *Id.* at 5.

116. H.R. 385, 103d Cong., 1st Sess. (1993).

117. H.R. 561, 103d Cong., 1st Sess. (1993).

118. H.R. 1388, 103d Cong., 1st Sess. (1993).

119. H.R. 3784, 103d Cong., 2d Sess. (1994).

request compensation, after which the agency has ninety days to offer to buy the property or pay the owner the amount the property was devalued.

Near the end of the 103rd Congress, when property rights became a stronger issue, many other members of Congress began to introduce legislation of their own. Senator Phil Gramm of Texas introduced the strongest property rights bill to date, requiring the government to pay just compensation to the owners of land that is devalued by twenty-five percent or more (or \$10,000 or more) due to government regulation. Responding to the listing of the golden-cheeked warbler as threatened—a move that would affect thirty-three Texas counties—Senator Kay Bailey Hutchinson introduced legislation preventing any further listing of any species or habitat under the Endangered Species Act until that act is reauthorized.<sup>120</sup>

Because of strong opposition by the White House and congressional leaders, none of these bills has succeeded. The blockading of such legislation is a clear indicator of how the federal government is turning its back on the Constitution. During the floor debate on his bill, Senator Dole addressed the issue in stark terms:

Our Founding Fathers deeply believed in the right of American citizens to hold private property and that Government should not invade upon that right. . . . When I introduced S. 177, I mentioned that its intention might seem curious—requiring Federal employees to uphold the Constitution—an activity in which they swore to engage before they were hired. Maybe we should get everyone in Government to take an oath every year so they would not forget.<sup>121</sup>

With one possible exception,<sup>122</sup> then, the only “progress” property rights proponents made in the 103rd Congress was to block environmental legislation. Property rights amendments were attached to every regulatory reauthorization going through the House of Representatives and Senate, causing their sponsors to pull their bills from further consideration. Secretary of the Interior Bruce Babbitt’s bill to make his National Biological Survey was loaded with so many amendments that he opted to create and fund his number-one priority without congressional approval.

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120. S. 2451, 103rd Cong., 2d Sess. (1994).

121. 139 CONG. REC. S5337 (daily ed. Apr. 19, 1993) (statement of Sen. Dole).

122. The exception was the eleventh-hour passage of a property rights rider to the California Desert Protection Act, Pub. L. No. 103-433, 108 Stat. 4471 (1994). While the act itself is a setback to property owners (it prohibits development on 6.4 million acres of desert land in California, including 700,000 acres of private land needed for the preserve), the rider at least prohibits federal officials involved in eminent domain proceedings from using the presence of the desert tortoise and other endangered and threatened species to snap up the acreage at cut-rate prices. *Id.* § 710, 108 Stat. 4501.

Amendments relating to property rights, risk assessment, and controlling unfunded mandates, thanks to a lobbyist's memorandum to environmental leaders, became known as "the unholy trinity."<sup>122</sup> That memorandum indicated that the environmentalists had spread themselves too thin, and that their chances of passing legislation without the reforms of the trinity were slim.

Opposition to property rights demonstrates not only how far Washington has strayed from the intentions of the Founders, but also how far it is from the will of the American people. Frustrated by the refusal of the courts and the federal government to acknowledge the requirements of the Fifth Amendment, property owners have turned to the state legislatures for relief.

#### V. STATE LEGISLATION: A NEW HOPE

It is at the state level that property owners have become most active in efforts to protect their rights from the "green machine." Across the nation, citizens are demanding the enactment of state property rights legislation. In reaction to this demand, state legislators are proposing two main types of property rights legislation: (1) planning bills, and (2) bills that identify a numerical percentage of diminution in value that triggers the constitutional requirement of just compensation.

##### *A. Planning or "Look Before You Leap" Bills*

Like proposed federal property rights bills, state planning bills are modeled after Executive Order No. 12,630. Just as the executive order does for the federal government, planning bills require state governments to "look before they leap" in regard to actions that might result in unconstitutional takings of private property. In just three years, more than sixty planning bills, usually dubbed "Private Property Protection Acts," have been introduced at the state level.<sup>123</sup> Six states have signed property rights legislation of this sort into law, and more than half the states now have property rights initiatives under consideration. The *National Law Journal* calls this mounting wave "The 'Property Rights' Revolt."<sup>124</sup>

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122. *Draft Legislative Strategy Paper Developed by Environmental Group Lobbyists Dated March 5, 1994 (Text)*, BNA, March 16, 1994.

123. Six planning bills have died in committee in various states. In three states, the bills have been stopped by a governor's veto (Florida, Missouri, and Idaho). Idaho Governor Cecil B. Andrus, Jimmy Carter's Secretary of Interior, has vetoed three such bills so far, but an override vote is expected. Richard Miniter, *Out to Change the Law of the Land*, INSIGHT, May 2, 1993, at 10.

124. Marianne Lavelle, *The "Property Rights" Revolt*, NAT'L. L. J., May 10, 1993, at 1.

The governor of Washington vetoed a planning bill in 1990. The state legislators, however, added it as an amendment to the Growth Management Act of 1991, which did pass.<sup>125</sup> Delaware enacted the first stand alone property rights law on January 21, 1992. That law establishes procedures for assessing whether proposed state rules and regulations result in a taking of private property.<sup>126</sup>

Arizona followed on June 1, 1992, with a planning bill similar to Delaware's. A campaign labeling the Arizona bill "the worst anti-environmental law ever passed in the United States"<sup>127</sup> enabled the environmental lobby to garner the 50,000 signatures necessary for a statewide referendum to repeal the law. In a campaign rife with false allegations about the effects of property rights legislation, Proposition 300 was defeated by a three-to-two margin. Property rights supporters in the state legislature, who increased in numbers during the same election, have promised to reintroduce strong legislation during the current term.

Meanwhile, Utah passed a law even stronger than the one voted down in Arizona over the strenuous opposition of the Utah Sierra Club and the Audubon Council of Utah.<sup>128</sup> Indiana requires its attorney general to alert the governor of any proposed rule that might entail a taking.<sup>129</sup> A joint resolution in Virginia has directed the creation of a joint subcommittee to study and if necessary change state procedures affecting property rights.<sup>130</sup>

### *B. The Fifty Percent Solution*

Planning bills are not, as critics charge, "the worst anti-environmental legislation ever passed in the United States," but they have serious weaknesses. As Maryland Attorney General Ralph S. Tyler points out, "no meaningful analysis can be done" of the liability at stake in a taking when so much depends not only "upon the particular circumstances" of the case, but on the philosophy of the particular judge hearing the case. Justice Brennan admitted the problem, namely the Supreme Court's failure "to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."<sup>131</sup> The Court has refused to define the terms "taking," "just compensation," "public use," and even

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125. WASH. REV. CODE § 36.70A.040 (Supp. 1994).

126. DEL. CODE ANN. tit. 29, § 605 (Supp. 1994).

127. Lavelle, *supra* note 126, at 34.

128. UTAH CODE ANN. § 63-90-1 to 63-90-4 (Supp. 1994).

129. IND. CODE § 4-22-2-32 (Supp. 1994).

130. 1994 Va. Acts 74; 1993 Va. Acts 624.

131. *Pennsylvania Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

"private property." When judges take this ad hoc approach to takings law, liability planning becomes a shot in the dark.

To address this problem, Defenders of Property Rights drafted a model takings bill defining a taking as a diminution of value of fifty percent or more. This becomes the statutory "trigger-point" at which a regulatory taking and inverse condemnation will be presumed to occur. Thus, the model bill would entitle property owners to automatic compensation upon proving that property was diminished in value by fifty percent as a result of government regulation.

This "compensation" bill would not preclude property owners subject to regulatory takings that fall short of the fifty percent trigger-point from legally challenging regulatory action. Moreover, any regulatory action that reduces the value of property must be reflected in the owner's property tax assessment by the exact amount that the property value is reduced. This type of bill has been introduced in fifteen states.<sup>132</sup>

In four states—California, Mississippi, New Hampshire, and Washington—combination planning/compensation bills have been introduced. The Mississippi bill, introduced in January 1994 in the Mississippi House (H.B. 1099), required that the property owner be compensated whenever the value of property is reduced by forty percent due to any "regulation, rule or guideline" promulgated for aesthetic or environmental purposes. The Mississippi Senate bill (S.B. 2005) defined a taking as a forty percent reduction in the value of property caused by "any regulatory program." Environmentalists fought the bill with every arrow in their quiver, fomenting concerns that local citizens would become powerless to zone the location of pornography shops if the bill passed.<sup>133</sup> The bill also was attacked as being racially motivated against blacks. So powerful was this fear that every black representative and senator voted against the bill. Despite this full-court press, the bill was defeated on a technicality rather than the merits of the environmentalist arguments. In its wake, a compensation bill was passed, albeit one covering only regulations that prohibit harvesting forests.

### *C. Criticisms of Property Rights Legislation*

The environmental establishment regards private property protection laws of either the planning or compensation variety as a threat to environmental protection. The National Wildlife Federation worries that planning bills will "impose higher costs on state agencies," and the Wilderness Society claims

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132. The states are California, Delaware, Florida, Georgia, Iowa, Kentucky, Mississippi, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, and Washington.

133. Sharon Ebner, *Battle Brews Over 'Property Rights' Law*, THE SUN HERALD, January 19, 1994, at A1.



they “will end up costing taxpayers millions of dollars.”<sup>134</sup> The environmentalists’ solution is to refuse to compensate individuals for takings, concentrating these same millions of dollars of costs upon the unlucky few.

“If the government is required in case after case to reward financially any party adversely affected by any environmental regulation, it [takings law] becomes the proverbial Damoclean sword hanging over environmental law,” says Albert H. Myerhoff, an attorney for the Natural Resources Defense Council.<sup>135</sup> “The reality is that the state simply cannot afford to pay off every landowner for every land-use decision,” writes Terry J. Harris in *Chesapeake*, the newsletter of the Potomac, Maryland, chapter of the Sierra Club.<sup>136</sup> “So, should the legislative strategy [for passing Maryland’s planning law] prevail, state and local governments are likely to throw out environmental protections as a too-expensive legal liability.”<sup>137</sup> Of course, the Takings Clause is a sword that cuts out only those takings (environmental or otherwise) for which the public is unwilling to pay—the exact intention of its authors.

Thus, the environmental establishment’s opposition betrays a fundamental ignorance about the nature of property rights legislation. These bills do not require the payment of just compensation for takings; the Constitution already does that. Planning bills merely require state agencies to assess the takings implications of their regulations before they are adopted. By requiring governments to “look before they leap,” they reduce the likelihood that citizens will get stuck footing the bills for multimillion dollar awards. Far from increasing costs, these bills actually save taxpayers money. It is worth noting that not one state having enacted property rights protection laws has experienced the doomsday scenario of neglect and cost explosion foretold by environmentalists.

Despite the claims of the environmentalists, even compensation bills would not increase the net social cost of environmental regulation involving takings. By establishing an objective definition of takings, they would simply ensure that the cost be spread among the general public rather than, to repeat Justice Brennan’s words, “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>138</sup>

It should be recognized that some property-rights advocates object to compensation bills. They are concerned that, by setting a threshold,

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134. Nancie G. Marzulla, *Who Benefits from State Private Property Regulation? You, the Taxpayer and Citizen*, LAND RIGHTS LETTER, June 1993, at 4.

135. W. John Moore, *Just Compensation*, NAT’L J., June 13, 1992, at 1405.

136.

137. Minitier, *supra* note 123, at 10.

138. *Pennsylvania Central Transportation Co. v. City of New York*, 438 U.S. 104, 123 (1978).

compensation bills might disparage the rights of property owners who are the victims of takings that fall below that threshold. To the contrary, as discussed above, compensation bills would not prevent property owners from obtaining compensation for takings that reduce property value by less than fifty percent. Such bills would simply require that once a taking crosses this threshold, the government must condemn and buy the property outright or pay the owner compensation for the loss in property value. While clarifying and mandating a compensation process for victims of takings that exceed the threshold, compensation bills would in no way impair the ability of property owners to obtain compensation for lesser takings.

A final criticism of compensation bills is that they are arbitrary. Why set the trigger point at fifty percent of property value? Why not higher or lower? Isn't that an arbitrary threshold? The fifty percent threshold is, to a degree, arbitrary. But the root problem in takings jurisprudence has been the inability of the courts to define a "taking." To resolve this problem, a statutory definition is needed. The only possible definitions that would not be arbitrary would be to (1) require condemnation proceedings for any diminution of value at all (even a fraction of a cent), or (2) to permit the government to take everything without compensation. The first choice is politically impractical, and the second means no limits on takings at all. Given the choice between an arbitrary limit and none, we must opt for a limit. The advantage of a fifty percent threshold over any arbitrary threshold is that at this point the government has taken as much value as the property owner retains. When that happens, the government legitimately may be expected to pay for the taking.

Some states may enact thresholds lower than fifty percent. This should not be discouraged—each state can establish its preferred threshold regarding takings. Even a federal compensation bill that concerned takings by the states and the federal government need not interfere with such federalist diversity. A federal law requiring condemnation or compensation for takings exceeding a given threshold would not curtail the ability of any state to set a lower threshold for takings by the state government.

Planning and compensation bills make sense. In particular, the criticisms of the major environmental groups are misplaced. "What we're seeing is a concerted, multifaceted effort to use the state forum to pursue the anti-environmental agenda," says John D. Eschaverria, chief legal counsel of the National Audubon Society.<sup>139</sup> "An increasingly militant property rights movement," writes a Sierra Club official, "is poised to reverse decades of environmental progress."<sup>140</sup> The truth is that the environmental movement and regulatory takings are blithely exposing taxpayers to millions of dollars in

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139. Lavelle, *supra* note 124, at 1.

140. Miniter, *supra* note 123, at 11.

liability, which is the surest way of destroying public support for genuine environmental conservation.

## VI. CONCLUSION: PROPERTY RIGHTS AS HUMAN RIGHTS

While much of the angst and anger in the property rights movement is directed against the organized environmentalist establishment and its lobbyists, private property institutions support rational environmental conservation. Many property rights leaders are prominent conservationists. Dayton O. Hyde, for example, started Operation Stronghold after he lost the use of his property because he created a wildlife habitat that made the property subject to wetlands protection regulations.<sup>144</sup> Bill Ellen, a Greenpeace and World Wildlife Fund supporter and founder of the nonprofit wildlife rescue center Wild Care, became involved in the property rights movement after being prosecuted and jailed for allegedly violating wetlands regulations while creating wetlands.<sup>145</sup> Ann Corcoran, a former National Audubon Society lobbyist, started the *Land Rights Letter* after the federal government classified a neighbor's land as wetlands, preventing a planned development.<sup>146</sup>

The notion that private property itself is "anti-environmental" is flatly wrong. To appreciate the importance of the institutions of private ownership in maintaining a healthy environment, one need only look at the unprecedented environmental catastrophe produced in Eastern Europe by the absence of such institutions. In the United States, private lands are far better managed ecologically than those run by the government. The "commons" are always at the mercy of politically powerful special interests with no stake in the land. Exclusive ownership and liability create the only effective incentives to conserve resources and minimize pollution. A property owner who blights his land destroys his own estate and that of his heirs; when a bureaucrat blights "public" land, he bears none of the cost. When land belongs to everyone, it

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144. See Siok-Hian Tay Kelley, *Glendora Group Shapes Land to Save Wildlife Environment*, LOS ANGELES TIMES, December 7, 1989, at J4; Jim Stiak, *Oregon Writer Dayton Hyde Preaches "Holistic Ranching,"* THE OREGONIAN, July 30, 1989, Northwest Magazine at 12; Rogers Worthington, *Mustang Meadows: Wild Horses Feel At Home on This Range*, CHICAGO TRIBUNE, June 28, 1989, at A6.

145. *Md. Wetlands Conviction Stirring Heated Debate*, WASH. POST, February 20, 1993, at F6; H. Jane Lehman, *A Changing Tide on Wetlands Decisions Violators Caught in a Tug of War Over Property Rights, Environmental Protection*, WASH. POST, January 18, 1992, at E1.

146. See Mary Corey, *'Wise Use' Advocates Take on Environmentalists*, BALTIMORE MORNING SUN, April 29, 1992, at B1; Liz Bowie, *Environmental Rebels Assail Focus on 'Birds And Bugs,'* BALTIMORE MORNING SUN, September 25, 1991, at A1.

actually belongs to no one. This is the source of the "tragedy of the commons."<sup>147</sup>

Experience teaches that uncompensated takings in the name of environmentalism often create perverse disincentives that are themselves anti-environmental in effect. If the price of creating habitat is losing property without compensation, who will create habitat? The property rights movement is not seeking less environmental protection; it asks only that a few unlucky landowners no longer be forced to bear an unfair share of the burden imposed by such regulations.

More fundamentally, the underlying assumption is that taxpayers are unwilling to bear the enormous cost of environmental takings, suggesting an acknowledgment that at least some such takings do not really serve an overriding public interest. If the public will oppose a taking once it learns of the cost, why foist this cost on a defenseless minority?

When any faction, including the organized environmental movement, is able to serve its interests at the expense of a politically weaker group, it may lobby more successfully for takings that, although of dubious public benefit, appear "free" to taxpayers. In contrast, when the costs are borne by the taxpayers, the putative benefits come under voter scrutiny and are weighed against those costs. Regulations are most cost-effective when the party to whom the alleged benefit accrues, in this case the public, bears the cost.<sup>148</sup>

Ultimately, however, uncompensated taking is not just a problem of economic efficiency, but of justice. This danger was outlined by Chief Justice Holmes in 1922:

The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend that qualification more and more until at last private property disappears.<sup>149</sup>

In his 1985 book, *Takings: Private Property and the Power of Eminent Domain*, Professor Richard Epstein argues that property is the barrier between the individual and the naked power of the state; it is the guarantor of all other rights, including freedom of speech.<sup>150</sup> How many will speak out, he asks, if the government can take everything you have?

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147. See Jerry Ellig, *The Economics of Regulatory Takings*, 46 S.C. L. REV. 595 (1995).

148. These "public choice" aspects of regulatory takings are discussed in Ellig, *supra* note 147, and Michael DeBow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579 (1995).

149. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

150. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN*, 137-39 (1985).

Property can be likened to an orange. Government regulation can crush out the meat, juice, and pulp of property use and value—leaving the owner only the worthless rind of title to property he or she may not use but still must pay taxes on. This abrogates the rights “to possess, use and dispose of” property.<sup>151</sup> When the government can do so without paying compensation, we are perilously close to Ludwig von Mises’ definition of fascism: socialism behind a sham facade of private property. As the Supreme Court noted in 1972:

The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a ‘personal’ right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither would have meaning without the other.<sup>152</sup>

Justice Joseph Story put the issue starkly when he wrote, “Where the rights of property have not been held inviolable, there has never been what we call human rights.” To defend human rights, we must ensure that forced transfers of property—not just through the power of eminent domain, but also through regulatory takings—be allowed only when just compensation is paid.

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151. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

152. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).